Oak Ridge Hospital of the United Methodist Church *and* Dixie R. Hicks *and* and Service Employees International Union, Local 150-T, AFL-CIO. Cases 10-CA-17920 and 10-CA-17639

25 May 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 15 July 1983 Administrative Law Judge Howard I. Grossman issued the attached decision. The Respondent and Charging Party Dixie R. Hicks filed exceptions. The Respondent filed a supporting brief and an answering brief to Charging Party Hicks' exceptions, and the Union filed a supporting brief and an answering brief to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.

We agree with the judge's conclusion that the Respondent violated Section 8(a)(3) of the Act by laying off respiratory therapists Ken Provance and Barbara Coker in retaliation for their union activities. However, we do so for the reasons set forth below.

Initially, we note that the Union represents employees employed at the Respondent's hospital. The parties' most recent collective-bargaining agreement is effective from 20 July 1981 through 24 July 1984. On 20 July 1981, certain of the Respondent's Grade 4 respiratory therapists, including Provance and Coker, filed a grievance requesting that they be upgraded to a Grade 6 or, alternatively, that their job descriptions be rewritten. In response, the Respondent agreed with the Union that certain respiratory therapists would be provisionally promoted to a Grade 7 subject to their becoming "credentialed" by fulfilling certain educational criteria within a specific time frame. The Respondent then entered into individual agreements with each of the affected respiratory therapists. The agreements proffered for Coker and Provance each provided, in pertinent part, that they would be promoted to a Grade 7 but that each must successfully complete the educational program in which they were then enrolled no later than 28 February 1982 and that they sit for and pass the first certification examination for which they were eligible. The agreement also provided that the failure to fulfill these requirements would result in a demotion to Grade 4 assuming an opening then existed. Prior to signing the agreement, Provance was apprehensive that he might be signing away his job. The Respondent's manager Stewart[3] assured Provance that this would never happen and that signing was "strictly a formality" necessary to get everyone upgraded. The Respondent's personnel director Vaughn also assured Provance that there would be no cutback in the work force and that there was ample work for everyone. Stewart also assured Coker that nothing would happen to her job and that the agreement was just a formality. After receiving these assurances, both Provance and Coker[4] executed their agreements 27 August 1981. Union President Martha Nelson also cosigned each of these agreements.

Regarding these employees' union activities, the record shows that Coker became a union steward in August 1981. She subsequently filed about 10 grievances and also filed an unfair labor practice charge in the fall of 1981 which was later withdrawn. In February 1982 Stewart asked Coker why she had withdrawn the charge and he told her that she probably would be going back to the Board in a couple of weeks because there was a "surprise."

Provance meanwhile had become assistant chief steward for the Union around September 1981. The first grievance he filed alleged certain unsafe conditions relative to the Respondent's trash compactor. In February 1982 a newspaper reported that the Tennessee Occupational Safety and Health Commission had fined the Respondent for unsafe conditions relative to the compactor. The day after the newspaper article appeared, Vaughn asked Chief Steward Wieger whether it was she who was responsible for it. When Wieger denied responsibility, Vaughn said "that leaves only Ken [Provance]" and he told Wieger that the Respondent's vice president Ralph Lillard was "madder than hell" about the story.

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. However, unlike the judge, we have placed no reliance on the testimony of Jena Harris.

[3] In sec. III,C,1 of his decision, the judge stated that Stewart became manager of the Respiratory Therapy Department in July 1980, whereas the record shows that he assumed that position in July 1981. This inadvertent error is insufficient to affect the results of our decision.

[4] Coker was then known as Barbara Young.

As of 28 February 1982, the date by which Coker and Provance were to have completed their schooling, neither admittedly had fulfilled the requirements set forth in the provisional promotion agreement they had executed. Coker had failed a required school examination which she then retook in late February. The test results, however, were unknown 28 February. Provance had not yet taken the examination necessary to complete his educational work, but he was scheduled to take it about a month later.[5]

At the end of February, Stewart separately advised Coker and Provance that there would be a meeting in Vaughn's office the following Monday, 1 March, and that they would be laid off because they had failed to fulfill the requirements of their individual agreements. Provance asked Stewart "if I was not a union official don't you think this could be worked out?" Stewart replied, "[Y]es, probably, but that's it. This is the way it's going to be." Stewart pointed to a copy of the collective-bargaining agreement and told Provance, "You make me stick by this. If I have to live by this you will live by this [i.e., the promotion agreement]." In their meeting, Stewart told Coker that if she had spent more time studying and less time on the "union shit" she probably would have passed her test.[6] Stewart also told Coker that "you people have made me live by this little green book [the collective-bargaining agreement], and I'm going to make you live by your contract."

At the meeting 1 March, Coker and Provance were advised that they were being demoted to a Grade 4 because they had not met the requirements in their agreements and that they were laid off because there were no Grade 4 positions available. Wieger had joined the meeting in progress. She then was summoned by Vaughn and Stewart into a separate office where she was offered "a deal," a "30-day extension." Wieger protested that an extension would not help anything. Wieger asked them if they realized what they were doing to the employees. She told Vaughn and Stewart that Coker was a good employee even though she had been a thorn in their side at times. Wieger also told them that Provance was an excellent employee. Stewart replied, "I know, but how can I do it to Barbara without doing it to Ken?" Wieger, Stewart, and Vaughn then returned to Provance and Coker. Stewart then offered Provance a 30-day extension of time in which to fulfill his requirements. Provance rejected this offer because he could not possibly have fulfilled the requirements within 30 days and because the Respondent had not made a similar offer to Coker. Respiratory therapist Dora Bice also was demoted to a Grade 4 in early 1982 after she had failed her National Board Test. Bice said that, in discussing her demotion with Stewart, he told her that Barbara Coker was a troublemaker and that he had gotten rid of the troublemaker and that Bice and Provance "got caught in the crunch."

In April 1982 the Respondent recalled Provance to a Grade 4 position and shortly thereafter promoted him to a Grade 7 even though Provance had not yet received the results of the school test he had taken earlier. The Respondent offered Coker a part-time Grade 7 position in August 1982. She declined because the position offered was outside her Grade 4 classification and because it was part time. Coker subsequently accepted the Respondent's offer of an occasional position.

In these circumstances, we agree with the judge's conclusion that the General Counsel established a prima facie case that the layoffs of Provance and Coker were motivated by their union activities and that the Respondent has not rebutted that case by establishing that they would have been laid off in the absence of their union activities. Thus, we note that the Respondent's resentment of Coker's union activities is evident in Stewart's characterization of Coker to Bice as a "troublemaker." While Provance and Coker appear to have left themselves vulnerable to being laid off by executing the individual agreements and then failing to meet the requirements, we note that Provance and Coker executed these agreements only after receiving assurances from Vaughn and Stewart that they were not jeopardizing their jobs in doing so. Moreover, we note that Stewart virtually admitted to Provance that something could have been worked out were Provance not a union official. Since the Respondent later promoted Provance to a Grade 7 notwithstanding that it was then unknown whether he had successfully completed his school test, it is evident that the Respondent attached little importance to the timely completion of these requirements. Rather, the Respondent seized on these agreements as a means of getting rid of the "troublemaker," Coker, and to retaliate against both her and Provance's union activities. Thus, we agree

[5] The judge found that the "examination" which Provance and Coker had not then successfully completed was the "Certification Examination" administered by the National Board of Respiratory Therapy. However, the record shows that the examination in question was that incident to their course work rather than the national certification exam.

[6] In sec. III,D,2 of his decision, the judge erroneously attributed these remarks to Vaughn. This inadvertent error is insufficient to affect the results of our decision.

that the Respondent's layoff of Coker and Provance was violative of the Act.[7]

To more appropriately remedy the violation found herein, however, we find it necessary to alter the judge's recommended Order in certain respects. First, we shall not require that the Respondent reinstate Coker to a full-time position at the Grade 7 level. Rather, we shall require that the Respondent reinstate Coker to a full-time position at the grade level for which she is qualified. In so doing, we note that the Respondent, Coker, and Union President Nelson executed an agreement stipulating that Coker's employment at the Grade 7 level was contingent on her fulfilling certain requirements. We do not agree that the Respondent is required to employ Coker at the Grade 7 level absent her meeting these requirements. We will leave to the compliance stage of this proceeding the question of whether Coker is qualified for a position at the Grade 7 or Grade 4 level.[8]

The judge also recommended that the Respondent be ordered to delete from its individual promotion agreements with Provance and Coker the requirement that they pass a certification examination to retain their positions at the Grade 7 level. This remedy was based on the judge's finding that these individual agreements were inconsistent with the general agreement reached with the Union in that the general agreement did not require the passage of a certification examination for retention of the Grade 7. We find it inappropriate to require the Respondent to alter these agreements. We note that, while the individual agreements may have been inconsistent with the general agreement, the Union apparently had no objection to this since the Union's president cosigned each of these individual agreements along with Provance and Coker. Moreover, we note the absence of any allegation here that the individual agreements, in and of themselves, are unlawful. Rather, the unlawful conduct found here pertains only to the Respondent's having seized on these agreements as a means to lay off Provance and Coker in retaliation for their union activities. This conduct will be fully remedied by requiring the Respondent to reinstate Coker and to make her and Provance whole for any losses they may have incurred. In these circumstances, we find it inappropriate to require the Respondent to alter these agreements and we shall delete this requirement from the judge's recommended Order.

Finally, we disagree with the judge's finding that the Respondent's offer to Provance of a 30-day extension of time in which to complete his requirements was of no benefit to Provance. We note that, had Provance accepted this offer, he would have been working and thus earning wages during this 30-day period. Accordingly, Provance's refusal of the offer may have affected the amount of backpay required to make him whole for wages lost as a result of his unlawful layoff. We shall leave to the compliance stage of this proceeding the determination of the impact of Provance's refusal to accept the extension on the amount of backpay to which he is entitled.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Oak Ridge Hospital of the United Methodist Church, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Offer Barbara Coker immediate and full reinstatement to a job at the grade level for which she qualifies or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her and Ken Provance whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision."

2. Delete paragraph 2(b) and reletter the subsequent paragraphs accordingly.

3. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that the complaint allegations not specifically found herein are dismissed.

[7] In so doing, we find it unnecessary to rely on the judge's finding that the Respondent treated more favorably employees Brent, Mitchell, and Bice than it did Provance and Coker in setting forth the criteria necessary for each of these employees' promotions and retention of their promotions. In this regard, we note that the record shows that Brent, Mitchell, and Bice were not similarly situated with Provance and Coker with respect to scholastic achievement and experience. Thus, we disagree with the judge's finding that the evidence is sufficient to establish that the Respondent imposed more stringent criteria on Provance and Coker in setting different requirements for their promotions. However, even absent evidence of disparate treatment, in this regard, we find ample grounds, as noted above, to establish that the Respondent seized on the failure of Coker and Provance to fulfill their requirements as a means of laying them off in retaliation for their union activities. But, in so concluding, we also place no reliance on the judge's discussion of the overtime worked by other respiratory therapists about the time of Coker and Provance's layoff.

[8] Member Dennis agrees that whether Coker should be reinstated as a respiratory therapist at Grade 7 or Grade 4 should be left to compliance; she does not agree that Coker's reinstatement at Grade 7 is necessarily contingent on meeting the requirements of her agreement with the Respondent. The Respondent "attached little importance to the timely completion of these requirements"; it promoted the other discriminatee, Provance, before it knew if he had met the same requirements.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT lay off or otherwise discriminate against any of you for supporting Service Employees International Union, Local 150–T, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Barbara Coker reinstatement to her former position as a full-time employee in our Respiratory Therapy Department at the grade level for which she qualifies and make her and Ken Provance whole for any loss of earnings and other benefits resulting from our unlawful layoff of them, with interest added to backpay less any interim earnings.

WE WILL notify each of them that we removed from our records all references to their layoffs and that the layoffs will not be used against them in any way.

OAK RIDGE HOSPITAL OF THE UNITED METHODIST CHURCH

DECISION

STATEMENT OF THE CASE

HOWARD I. GROSSMAN, Administrative Law Judge. The charge in Case 10–CA–17920 was filed on February 23, 1982, by Dixie R. Hicks (Hicks), and the charge in Case 10–CA–17639 was filed on March 8, 1982, by Service Employees International Union, Local 150–T, AFL–CIO (the Union). An order consolidating cases and complaint issued on March 28, 1982, alleging that Oak Ridge Hospital of the United Methodist Church (Respondent), suspended Hicks on October 28, 1981, discharged her on December 9, 1981, and laid off employees Ken Provance and Barbara Coker on March 1, 1982, because of these employees' union and other concerted activities in violation of Section 8(a)(3) and (1) of the National Labor Relations Act (the Act).

A hearing was held before me on these matters in Oak Ridge, Tennessee, on November 2 and 3, 1982. On the entire record, including my observation of the demeanor of the witnesses and consideration of briefs filed by the General Counsel, the Union, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Tennessee corporation with an office and place of business located at Oak Ridge, Tennessee, where it is engaged in the operation of a hospital. During the calendar year preceding issuance of the complaint, a representative period, Respondent received gross revenues in excess of $250,000, and, during the same period, purchased and received at its Oak Ridge, Tenneessee hospital goods valued in excess of $50,000 directly from suppliers located outside the State of Tennessee. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The pleadings establish and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Union had represented the hospital's employees for several years. Negotiations for a new contract took place in early 1981, and a 3-year contract was signed, effective July 20, 1981 (G.C. Exh. 14). Thereafter, the Union was placed in trusteeship, and a new chief steward, Edna Wieger, was appointed in August 1981.

B. *Dixie R. Hicks*

1. Hicks' employment record

Hicks had been employed for about 10 years. She started as an occasional employee, working whatever shift was designated for her, and later became a full-time licensed practical nurse. She was reprimanded in 1975 for spending too much time with male patients and drinking too much coffee, and again in 1977 for tardiness. In October 1980, Nursing Supervisor Earline Brewer reprimanded Hicks for excessive absences from work and for tardiness without calling the hospital. Brewer told Hicks that continuation of this conduct would result in a written reprimand. Hicks agreed with the accuracy of the charges, but said that tardiness was common. Brewer again discussed tardiness with Hicks in January and April 1981.

2. Hicks' union activities

Hicks was made a member of the union negotiating team in June 1981. She attended about two or three negotiating sessions. Hicks testified that she was "pretty verbal" in support of a raise for employees and increased pay for weekend and holiday work. There were no negotiating sessions after execution of the contract on July 20.

3. Additional discipline for tardiness

Hicks was late again on June 16. According to a later performance notice, she was supposed to have been on

duty at 7 a.m., and was called at 7:25 a.m. When Hicks had not arrived by 8:20 a.m., she was called again, and she said that she had gone back to sleep. Hicks arrived at 9 a.m. (R. Exh. 6). She was given a written reprimand and warned that future tardiness would result in suspension. The employee told Supervisory Nurse Brewer that she had three alarm clocks and was trying to improve.

On July 1, 1981, Hicks did not arrive at her scheduled time of 7 a.m. She was called at 7:20 a.m., and she said that her alarm had not rung because the power was off. The power company verified this (R. Exh. 6). On July 6, Hicks called the schedule coordinator and said that she would not be in the next day without giving a reason. According to Brewer, Hicks had requested the day off, and the request had been denied. Brewer called Hicks the next day, July 7, and the latter said that she had an upset stomach.

Hicks was scheduled to work on July 26. She testified that she was too ill to work, and tried to call but could not get a supervisor. After 15 minutes, she hung up. Hicks told her daughter to call later in the evening. Supervisory Nurse Brewer testified that a book in the scheduling office revealed that no call had been received. Hicks provided a doctor's excuse from one of the hospital doctors. It is on a preprinted form with the heading, "The Oak Ridge Hospital." The form indicates Hicks as the patient and is dated August 8, 1981. It reads, "Excuse from work July 26, 27 1981." The original dates were July 27 and 28, but these were crossed out and the indicated dates written in (G.C. Exh. 7).

Nursing Supervisor Brewer testified that she spoke to the doctor, who said that he had not seen Hicks. The latter asserted that the doctor denied making the statements attributed to him by Brewer. As a result of this incident, Hicks was suspended for 3 days without pay. She also acknowledged having been told that she had been tardy 28 times in the first 21 weeks of the year, on of such occasions more than 1-1/2 hours late (R. Exh. 6).

Nursing Director Vicki Moore testified that Hicks was late on October 28 without calling in to the scheduling coordinator. The unit secretary who initiated the inquiry was Edna Wieger, the union steward. The scheduling coordinator told Moore that Hicks had been persistently tardy over a long period of time. Moore pulled Hicks' timecards, and reviewed Nursing Supervisor Brewer's previous discipline of Hicks. According to Moore, the timecards showed that Hicks had been late six times since the last reprimand and suspension. Moore then dicussed the matter with the hospital vice president Elizabeth Cantwell, and the decision was made to suspend Hicks for 2 weeks (10 working days). Accordingly, Hicks was given a 10-day suspension without pay on October 28 (R. Exh. 8). Hicks said that she did not remember whether she had been late six times since her last suspension, but agreed that she was 20 minutes late on October 28. This suspension is alleged by the complaint to have been unlawful.

Nursing Supervisor Brewer testified that Hicks was 22 minutes late her first day of work after the 10-day suspension, and was also late on the third such day. Brewer had a counseling session with Hicks and union steward Wieger on November 17, 1981, at which time Hicks was reprimanded and informed that she would be discharged if she was late more than once a month. The reprimand reads, "This action is being taken because you have received a verbal reprimand, a written reprimand and two suspensions for your unacceptable behavior regarding your promptness on scheduled working days. After the last suspension you were 22 minutes late the first scheduled day back to work and 6 minutes late on the third day." (R. Exh. 7.) According to Brewer, Hicks replied that the supervisor was "picking on her." Hicks testified that she was late the first day after her 10-day suspension, although she did not recall being late the third day. She contended that she "agreed" with Brewer that her lateness was "wrong, totally wrong, and there was no excuse for it." Nonetheless, Hicks filed grievances alleging "harassment," and I conclude that she complained that Brewer was "picking on her."

4. The patient care incidents

a. *The paralyzed patient*

Nursing Director Vicki Moore testified that she had a patient who had suffered a stroke, and who was partially paralyzed. Moore received a complaint from the patient's family regarding the quality of nursing care which the patient was receiving, and went to investigate about October 20, 1981. Moore asserted that Hicks was administering oral medication with the bed at a 20-degree angle, thus being in a position which was not conducive to swallowing. The patient actually coughed, according to the nursing director. There were some orange slices on an overbed table, and Hicks asked the patient whether she wanted any. The patient nodded affirmatively, and Hicks then pulled the table over the bed, and took the patient's right arm—the only one she could use—out of the covers. Hicks then said she was going to lunch. As she was leaving the room, Moore said that she would feed the orange slices to the patient. Hicks walked back into the room and commented that Moore would have to raise the bed because the patient had difficulty swallowing. Moore assisted the patient with the orange slices. Moore and Brewer later reprimanded Hicks for administration of the medication in an unsafe position, which might have caused the patient to choke to death, and for inconsiderate treatment for failing to assist the patient in eating the orange slices.

Hicks' version of these events is not inconsistent with Moore's and Brewer's. Although she contended that she pushed the table with the orange slices over to the patient because she heard the lunch trays coming down the hall, she acknowledged that the patient could not feed herself.

b. *The Ollie Henderson case*

There are two incidents involving a patient named Ollie Henderson. Brewer testified that the patient was receiving an antibiotic medication, but that the dosage required constant monitoring because it was potentially dangerous. According to Brewer, the attending physician changed the medication order on December 3, 1981. The order was "checked off" by Hicks, but the latter failed

to destroy the old medication card according to customary practice. Accordingly, Henderson received medication the following day from another nurse, which was contrary to the physician's orders.

Hicks' version of this incident is not entirely clear. Asked whether she had been accused of failing to follow procedure in tearing up an old medicine card, Hicks testified as follows:

> No, it was my card, really. The R.N.'s do the I.V. therapy. And I did sign off the order because Mary Oaks was busy. And she had the old I.V. card. I don't know where she had it. I pushed the chart to her, and I said, "Mary, sign this off. It's on Mr. Henderson." And she was busy doing something. And I thought "Well, I can sign if off." So I . . . red lined it and put my name. And then I gave her the new I.V. card. I had no idea what happened to the old one. I did not have it because I did not give that medication.

Hicks first denied and then admitted that the nurse making up a new medication card has an obligation to destroy the old card in order to avoid unprescribed medication. However, she asserted that she did not have the old card, and did not know where it was. In a later written reprimand of Hicks, Brewer asserted that she had talked to "Oaks," and that the latter stated that, since Hicks had given her the new card, she did not think about destroying the old one. (G.C. Exh. 6.)

On the basis of this evidence, I infer that it was customary practice for the nurse making up a new medication card to destroy the old one in order to avoid administering discontinued medication. I also infer that Mary Oaks was a registered nurse (RN) and was administering intravenous (IV) medication to Henderson pursuant to a medication card. Hicks volunteered to prepare a new card when the revised medication order came down, but did nothing about destroying the old card, which Oaks had. The latter also failed to destroy the old card. As a result, the patient received unprescribed medication from another nurse the next day.

Brewer also testified that Henderson was depressed, and that there was a written nursing order stating that he was to be attended at meals and encouraged to eat. Although meal trays are served by various individuals, it is the responsibility of the assigned nurse to provide eating assistance if required. On December 7, a few days after the medication incident, according to Brewer, she entered Henderson's room shortly after 8 a.m. and found him flat on his bed with his breakfast tray on the bedside table away from the bed. Hicks agreed that Henderson had been assigned to her that day. Brewer assisted Henderson in eating, and then checked with the team leader, a registered nurse. Brewer determined that Henderson was Hicks' responsibility and testified that she found Hicks smoking a cigarette and drinking coffee in the nurses lounge. Brewer assumed that Hicks was on an early break, which had been authorized provided that Hicks had taken care of her duties.

Hicks agreed that she was in the lounge, but denied that she was on a break or was smoking or drinking coffee. Instead, she was reading a magazine, waiting for a telephone call from the laboratory with respect to another patient who was scheduled for surgery. Hicks said that she went back to Henderson's room, and saw Brewer preparing him for breakfast. Although Hicks agreed that it was not normally the function of the nursing supervisor to feed patients, she asserted that Brewer did help patients, and that it was not unusual to see her in the patients' rooms.

Brewer on cross-examination agreed that she did not know whether Hicks was waiting to prepare another patient for surgery. However, she denied that there was a telephone in the nurses lounge, and asserted that it was in the nursing station. If true, this would make it unlikely that Hicks was waiting for a call about another patient.

I conclude that a nursing order required that Henderson be assisted in eating, that he was assigned to Hicks, and that it was her responsibility to provide him with eating assistance. I also conclude that she did not assist him on the day in question, and did not arrange for another nurse to do so.

5. Hicks' reprimand and discharge

Brewer returned to the lounge and asked Hicks to explain why she had not fed Henderson. According to Hicks, she said that she was waiting for a telephone call about a surgical patient. According to Brewer, Hicks replied that she had not served Henderson his tray.

Brewer then prepared a written reprimand dated December 7 based on Hicks' failure to destroy the old medication card and her failure to provide assistance to Henderson in eating (G.C. Exh. 6). She presented it to Hicks. The latter had already prepared another grievance based on "harassment," and had it in her purse. According to Hicks, she put the grievance on top of the reprimand and said, "Well, if you're going to do that, then I have to do this." "What's that?" Brewer asked. "It's a bunch of bullshit for you to tell me after all these years of nursing that I'm not a good nurse," stated Hicks. She further stated, "I do my work and I work hard." Brewer then left, according to Hicks. Brewer's version is simply that Hicks threw the reprimand down on Brewer's desk and said, "This is a bunch of bullshit," and that it was Hicks who left. Hicks said that use of the word "bullshit" was not uncommon among the nurses.

Brewer reported this incident to Respondent's vice president Elizabeth Cantwell, who decided to discharge Hicks. Cantwell testified that she made this decision because all other methods, including counseling and suspension, had not been successful, and that matters seemed to be getting worse. Her reaction when Brewer reported Hicks' "bullshit" remark was that the "word epitomized how Ms. Hicks felt about her employer and her work. Judging by her behavior, I thought that that said it. And I didn't think we needed her on the staff."

Cantwell then discharged Hicks on December 9, 1981, in the presence of Brewer and chief steward Wieger. According to Brewer, Cantwell told Hicks that her attitude toward the hospital was that expressed in her remark to Brewer, and that there had been no improvement in her behavior. Brewer denied that any of the discipline ad-

ministered to Hicks had been caused by her union activities.

C. *Ken Provance and Barbara Coker*

1. Respiratory therapy

Prior to July 1980, respiratory therapy at the hospital had been performed by an outside contractor.[1] The hospital started performing the service itself in that month, and acquired the contractor's staff, including Ken Provance and Barbara Coker.[2] At the same time Michael Stewart became manager of the Respiratory Therapy Department.

2. The classification grievance

The hospital took over the contractor's employees at their existing rates of pay. The new contract provided that employees would be classified in accordance with their skills and paid accordingly (G.C. Exh. 14, art. 31). Provance testified that there were three classifications of respiratory therapists, but that all were required to do the same work and that they were underclassified. Provance and others considered this to be unfair and filed a grievance on July 21, 1981. It argued that noncredentialed O.J.T. (on-the-job training) therapists, then classified at Grade 4, should be raised to Grade 6, and that the job classifications should be rewritten (G.C. Exh. 8). In response, the hospital proposed three classifications—a Grade 4 respiratory therapy technician-II, who was required to have a high school diploma (R. Exh. 55); a Grade 7 respiratory therapy technician-I, who was required to have completed an accredited school of respiratory therapy or its equivalent (R. Exh. 57); and a Grade 9 respiratory therapy supervisor (R. Exh. 56). These were basically upgradings of the prior job classifications. Stewart testified that the principal change was the requirement that only "credentialed" therapists be permitted to handle acute care patients in the intensive care unit. Since only Grade 7's and above were considered "credentialed," this meant that Grade 4 employees could not work alone in that unit without supervision, although they had done so previously. This new policy was not mandated by any state or Federal regulation.

3. The Provance and Coker promotion agreements

a. *Summary of the evidence*

On August 25, 1981, Respondent's personnel director Larry J. Vaughn wrote union official David Jackson a letter proposing the provisional promotion of employees Ken Provance, Barbara Young (Coker), Gary Riggs, and Craig Brent from Grade 4 to Grade 7. The letter reads in part as follows:

> Also attached is the notice of promotion which gives specific details. It is also agreed that if the current employees who are provisionally promoted do not become successfully credentialed within the period of time specified in their notice of promotion they will be reduced to the position occupied at the date of this agreement provided it still exists and is vacant.

The attachment referred to in the letter reads as follows:

> In order for current Respiratory Therapy employees to be promoted to Certified Respiratory Therapist (G 7) they must meet the following criteria:
>
> 1. Be an employee of the Respiratory Therapy Department as of August 24, 1981.
>
> 2. Be enrolled in a recognized Respiratory Therapy program as of August 24, 1981 and be actively pursuing completion of the program. Employees must complete their program within the time limit established in their promotion notice.
>
> 3. Must sit for and successfully pass the certification exam the first time it is offered following completion of their educational program.
>
> It should be understood that employees who don't satisfy items 1 and 2 above will be demoted to their former position (G 4) if it still exists.

The letter itself is signed by Personnel Director Vaughn, for the hospital, and Martha Nelson, acting president of the Union (R. Exh. 47).

A few weeks later Provance and Coker were asked by Respondent to sign documents reading as follows:

> Your promotion from grade 4 to 7 is mutually agreed to be based on the following criteria:
>
> 1. That you continue in the C.C.R.T. program in which you are currently enrolled and successfully complete the program no later than February 28, 1982.
>
> 2. That you sit and successfully pass the first N.B.R.T. certification exam in which you are eligible often [sic] the date in provision one above.
>
> 3. In the event provisions 1–2 are not met at the appropriate time you will be reclassified to grade 4 and assuming an opening is present, with a change in pay and clinical duties. [G.C. Exhs. 12 and 15.]

Provance testified that he told Department Manager Stewart that he would not sign the document because of the way it was worded. As Provance put it, he might be "signing away [his] job." Further according to Provance, Stewart assured him that it was "strictly a formality, and it was just the process that they had to go through to get us all upgraded." Provance was not satisfied because Stewart was new on the job, and went to Personnel Director Vaughn with the same complaint about the language of the agreement. According to Provance, he received the same assurances from Vaughn—there was ample work for everybody and there would be no cutback in the force. The document was simply a necessary process in order to promote the employees. Provance went back to Stewart a second time and received the same information. The department manager asked Provance to persuade Coker to execute an agreement because she also had refused to sign. Provance repeated

[1] Bu-Edri and Associates.

[2] Coker had remarried by the time of the hearing, and her last name was then Young.

these assurances to Coker, and both employees signed the agreement on August 27, 1981, as did Martha Nelson. (G.C. Exhs. 12 and 15.) Provance and Coker were immediately promoted to Grade 7.

Coker testified that she had a similar conversation with Stewart. She told the department manager that she would not sign the agreement, and he replied that it was just a means of upgrading the employees and that nothing would happen to their jobs. Coker finally did sign because Provance told her he had received assurances from Vaughn.

Stewart testified on direct examination that Provance in a group discussion asked him what would happen if he did not meet the terms of the agreement, and that Stewart replied, "Well, you know, you've got six months here, and I can't predict where we're going to be staffing wise. I don't know if any grade four's will resign." If they did not resign, Stewart added, "then that would be a problem." On cross-examination, Stewart first admitted that he told Provance that signing the agreement was "just a formality." He was asked whether he told them that they would be laid off if they did not meet the contract requirements and no Grade 4 position was available. "That's what the document says," Stewart answered. Asked the same question, Stewart repeated the same answer, and finally denied having any conversation with Provance and Coker other than, "Let's come in here . . . and get this thing signed up."

Vaughn testified that Provance "dropped in" to express some "concerns" about the contract language. The personnel director replied that the language "wasn't really all that uncommon," that it was in the collective-bargaining agreement, and that there was not much of a history of layoffs although there had been a few. He said that Provance should have ample time to complete the program, and that the hospital would be amenable to an alternative deadline in the event of an emergency such as an accident or serious illness. Vaughn denied that there was any discussion about failure to meet the terms of the agreement absent an emergency.

b. *Factual analysis*

The hospital's letter to the Union dated August 25 and its attachment are ambiguous. The letter states that employees who do not become "credentialed" within the time period specified in their notice of promotion will be reduced to their former position provided that it is still available. The issue is whether the word "credentialed" means only passing a course in respiratory therapy, or also means passing the certification examination conducted by the National Board of Respiratory Therapy (NBRT). The attachment tends to clarify this ambiguity—the demotion will take place if the employee fails to meet conditions 1 and 2, i.e., continued employment in the Respiratory Therapy Department and enrollment in a recognized respiratory therapy program plus completion by a specified date. Successful passing of the certification examination is not specified by the attachment as a condition for maintenance of Grade 7.

The attachment is consistent with Respondent's determination of the Grade 7 criteria in its response to the classification grievance, which response upgrades former Grade 6 and merely requires completion of a course in an accredited school of respiratory therapy (R. Exh. 57). Under private law principles, ambiguity in a document is resolved against the individual who prepared it—in this case Respondent. This precept is all the more applicable in the field of public law, where the document in question is one prepared by an employer and affects the rights of employees. Accordingly, I find that Respondent and the Union agreed that employees indicated in the hospital's letter were to be provisionally promoted to Grade 7 so long as they remained employed in the department and successfully completed their schooling within the time frame set forth in the individual promotion notice. They were not required to have passed an NBRT examination.

It is clear that the promotion agreements presented to Provance and Coker were more rigorous than the agreement between the hospital and the Union because failure to pass an NBRT examination was made a ground for demotion to Grade 4.

Stewart's testimony is both contradictory and evasive. After admitting that he said signing the contract was just a "formality," he denied having any conversation about it. Vaughn's denial that there was any discussion about the effect of Provance's failure to meet the terms of the agreement, absent an emergency, is incredible in light of the fact that Provance was afraid he would be "signing his job away." It is also improbable that Provance and Coker would have signed the agreement without express assurances. They were credible witnesses, and I accept their testimonies that the hospital management assured them that their jobs would not be put in jeopardy if they signed the agreements.

4. Provance's and Coker's union activities—Respondent's reactions

Coker had been discharged in August 1980, a month after the hospital's takeover of the respiratory therapy program from the contractor. She filed an unfair labor practice charge and was reinstated pursuant to a settlement agreement. She filed other charges in late 1981, but these were withdrawn.

Coker became a union steward in August 1981, and filed about 10 grievances involving contract disputes. Edna Wieger, who became chief steward in August, testified that the filing of grievances was new compared to the absence of such activity under her predecessor as chief steward. On a few occasions, Wieger testified, Stewart said that he could not understand why the Union was starting a new practice of filing grievances. Employee Dora Bice filed grievances in her own behalf, and testified that Stewart said the hospital would not have had any problems if it had not been for the Union.

Provance became assistant chief steward in September 1981. The first grievance which he filed involved porters in the housekeeping department. They were required to enter an electrified trash compactor without safety precautions or protective clothing. Charges were filed against Respondent by OSHA, Provance stated, and the hospital was investigated by health authorities. A grievance was filed but was "getting nowhere," according to

Provance. A newspaper story appeared on February 10, 1982, stating that the Tennessee Occupational Safety and Health Commission had fined the hospital $315 in connection with the incident, and that the hospital had appealed.

Provance testified that he had nothing to do with the article. Coker affirmed that Personnel Director Vaughn asked her whether she knew who had written the article. Coker denied knowing this. Chief steward Wieger testified credibly that she had a conversation with Vaughn the day after the article appeared, and that he asked her whether she had put it in the paper. Wieger denied it, and Vaughn said, "That leaves only Ken [Provance]." Wieger denied that Provance was responsible. Vaughn stated that Vice President Ralph Lillard was "madder than hell" about the story, according to Wieger.

Provance filed other grievances pertaining to employee vacations and holiday time. A few weeks after the newspaper incident, Stewart called him in and said that he was being "written up for abuse of sick time." When Provance said that he did not understand, Stewart explained that he had examined Provance's records before the latter became a hospital employee, and that he had had an excessive number of sick days—more than three per year. Provance explained that the prior clinical manager had encouraged employees to claim sick time when "things were slack," but he received a written reprimand nonetheless. Coker was also reprimanded in September 1981 for abuse of sick leave, although she was actually hospitalized part of the time.

5. Testimony of Jena Harris

a. *Summary of the evidence*

Jena Harris was a Grade 9 supervisor in the Respiratory Therapy Department, having been hired by the hospital in August 1981. She attended about two supervisory meetings, and testified that Department Manager Stewart said that Coker and Provance were causing a lot of trouble by filing grievances. Harris also testified that she attended a seminar in Atlanta with Stewart and Supervisor Debra Cox. There was additional discussion of the "problems" Coker and Provance were causing the hospital, and either Stewart or Cox said that the hospital "needed to get rid of them."

Supervisor Debra Cox testified that she took an automobile trip to Atlanta during the last weekend in February 1982, together with Stewart and Harris. She denied hearing Stewart refer to Coker or Provance as troublemakers, or saying anything in particular about either employee. Stewart, however, admitted having conversations during this trip "involving all department employees." Asked to specify how the conversations related to Provance and Coker, Stewart replied: "Just that we've got people in the department that seem to resist change quite a bit, and who don't want to seem to see the benefits of what we're trying to do as . . . a whole."

Respondent attacks Harris' credibility on the ground that she was biased. Cox became assistant department manager in March 1982, and testified that she reprimanded Harris. The first such "reprimand" is a memo from Cox to Harris dated May 18 recording a prior discussion of Harris' "poor attitude" in response to another memo, together with Harris' denial thereof and assertion of a heavy workload (R. Exhs. 38 and 39). Another memo of the same date asserts that Harris failed to complete an order, together with Harris' response that another employee had already completed it but that it had not been filed (R. Exhs. 40 and 41). Another memo of the same date complains about the failure to complete a "shift report," together with Harris' reply (R. Exh. 42).

Respondent introduced a memo written by Stewart dated September 8 reciting Harris' alleged supervisory shortcomings, together with a demotion to staff assistant at Grade 7 or 9 depending on her response (R. Exh. 43). Cox said that the hospital's action was the result of employee complaints about Harris as well as her failure to perform supervisory duties. According to Stewart, Harris read the memo and told him to "cram it up his ass." She walked out and slammed the door (R. Exh. 43). Cox asserted that Harris said she would tear Stewart and Cox to "shreds," and he could take the writeup and the job and "cram it up his ass," and that she left and never came back. Stewart corroborated this evidence stating that Harris said she would consult with her husband about "appropriate action."

Harris gave a somewhat different version of her tenure at the hospital. She testified that she had a conversation with Cox in which the latter expressed an opinion that Harris was interested in joining the Union. If Harris did this, Cox added, "the administration would not look kindly on her." Thereafter, according to Harris, she was "harassed and badgered" to the point that she quit. She denied that she had received any "reprimands," although she acknowledged two or three "oral discussions" and the fact that some employees may have made complaints about her as a supervisor.

Harris' version of the last interview is also different from that presented by management. According to Harris, Stewart said that he was dissolving the day-shift and night-shift supervisors, and offered her a position as staff therapist. Harris denied being told that she had been demoted, and was not asked on cross-examination whether she had ever read Respondent's Exhibit 43 announcing her demotion, as Stewart asserted was the case. Harris also denied telling Stewart that she would cause him all the trouble she could—instead, she averred, she asked Stewart to specify her "forum of grievance."

b. *Factual analysis*

Respondent's evidence attacking Harris' credibility itself presents credibility issues. Harris candidly admitted the possibility of some shortcomings as a supervisor. Her denial that she had ever been "reprimanded" is tempered by her acknowledgment of "oral discussions." The evidence of the final interview is inconclusive, particularly in light of the fact that Harris was never asked whether she had read Stewart's memo "demoting" her. Her testimony that Cox expressed concern about Harris' joining the Union is unrebutted. In sum, Respondent's evidence is insufficient to establish that Harris was an unreliable witness.

On the substantive issues, Harris' testimony that Stewart said Coker and Provance were causing a lot of trouble by filing grievances is unrebutted, and corroborates similar testimony from Wieger and Bice. I also credit her testimony that Stewart or Cox, during an automobile trip to Atlanta, said that the hospital "needed to get rid of" Provance and Coker. I note that Respondent's witnesses gave contradictory versions. Cox denied any conversation about Coker and Provance whatever, while Stewart admitted saying that they "resisted change quite a bit." Harris had the demeanor of a truthful witness, and her averments have greater probative weight than Respondent's contradictory evidence.

6. Coker's and Provance's status under the promotion agreements—Coker's conversation with Stewart in February

Coker had been allowed to take the NBRT certification examination, from which fact I infer that she had completed a course in respiratory therapy—the NBRT did not allow an applicant to sit for this examination without having completed a recognized course. Coker failed the NBRT examination in late 1981, and took it a second time in early 1982. The results of the second examination had not been received at the time of her layoff on March 1. Provance was scheduled to take the examination for the first time on March 29.

As noted above, Coker filed charges against Respondent in late 1981, which were withdrawn. During February 1982 as she was cleaning equipment, Stewart approached her and a conversation ensued. According to Coker, Stewart first asked her why she had dropped her charges filed with the Board, and Coker replied that she thought it best after talking to Vaughn. Stewart asked what she thought would have come of them, and Coker replied that she did not know.

Coker had had experience with blood gas studies, and had requested documentary proof of this from the hospital in order to forward them to the State. This was required of individuals who did blood analysis work. According to Coker, she asked Stewart for these documents during this conversation, and he replied that she would not be needing them. Coker asked for an explanation, but Stewart gave none. Instead, he returned to the subject of the withdrawn charges, and finally said, "Well, it's no matter. You'll probably be going back to the Board in a couple of weeks." Coker asked, "Why?" and Stewart replied that it was a "surprise."

Stewart acknowledged having a conversation about this subject with Coker, but gave a different version of it. According to the department manager, Coker's documents on blood work were being processed, and he told her that he would take care of the matter. He denied telling her that it would not make any difference whether the documents were forwarded.

Coker's testimony was not completely denied by Stewart—in particular, her averment that he inquired about the withdrawn Labor Board charges, and said that there would be a "surprise" and that she would be "going back again." Coker was a more reliable witness, and I credit her version of this conversation.

7. Stewart's meetings with Provance and Coker on February 26

a. *Summary of the evidence*

Provance testified that Stewart called him into the office on the last weekday of February (Friday, February 26, 1982), and announced that there would be a meeting the following Monday at which the hospital would have to lay off Provance. The latter asked the reason, and Stewart answered that Provance had not lived up to the terms of the promotion agreement. "Michael," Provance protested, "you assured me that nothing would ever come of this." Stewart then pointed to a copy of the union contract and said, "You make me stick by this. If I have to live by this, you will live by this" (gesturing toward the promotion agreement). "Michael," Provance replied, "if I was not a union official or officer, don't you think this could be worked out?" "Yes, probably," Stewart answered, "but that's it. This is the way it's going to be."

Provance informed Coker about this conversation, and the latter also had a discussion with Stewart on the same day. He told her that he was going to lay her off because she had not fulfilled the requirements of the promotion agreement. Coker protested, "But you told us that it wouldn't have anything to do with us being laid off, that there was always plenty of work for grade 4's. There was no lack of work around here." According to Coker, Stewart replied, "I know what I said. You people have made me live by this little green book [the union contract], and I'm going to make you live by your contract." Stewart added that "one of them [the two agreements] had to go," and told Coker to come to a meeting the following Monday. During this interview, Coker informed Stewart that she had failed her first examination, but that she had taken it again.

Stewart agreed that he had similar conversations with Provance and Coker toward the end of February. Provance protested about being "caught up in the mess," and Stewart replied that he had "this book to live by. And this agreement [the promotion agreement] is simply an extension of that book. I honor my end of it. You have to honor your end of it." Stewart affirmed that he said maybe something could be worked out at the meeting on Monday.

b. *Factual analysis*

Stewart's testimony about requiring adherence to the promotion agreement, because of the requirement that he abide by the union contract, corroborates the testimonies of Provance and Coker. Stewart did not deny Provance's testimony that he said the matter might be adjustable if it were not for Provance's position as a union official, and I credit that testimony.

8. The layoffs

a. *Summary of the evidence*

(1) The March 1 meetings

Provance and Coker attended a meeting in Personnel Director Vaughn's office at 11 a.m. on March 1. Also present were Department Manager Stewart, union business agent Glenn Girby, and chief steward Edna Wieger. Vaughn stated that he passed out copies of the classification grievance and the settlement which had been agreed on by the parties. According to Provance, the management officials told him and Coker that they would have to demoted to Grade 4 because they had not complied with the promotion agreement, and then laid off because there was no Grade 4 work available. Provance protested that he had seniority over other Grade 4's.[3] Vaughn became "very upset," according to Provance. "You don't have any seniority," he said. "What about bumping rights?" Provance asked. "Well," Vaughn responded, "I'll tell you about your bumping rights, Mr. Provance. You're out the door, buddy, and you've got no recourse." Vaughn corroborated this testimony.

Provance testified that Vaughn, Stewart, and Wieger left the room, and later returned. Stewart told Provance that he would like to offer him a 30-day extension on his contract. Provance (or Wieger) replied that this would not do him any good because he was not scheduled to take the examination until March 29, and there was no possibility that he would receive the results the following day. Provance also rejected the offer because it had not been offered to Coker, and was, therefore, unfair, and gave this an additional reason to the hospital authorities. He and Coker then got their pink slips laying them off because there was "no vacancy or work for R. T. (O.J.T.)," i.e., Grade 4 (R. Exh. 1).

Coker also testified that Vaughn laid her off because of "lack of work." She affirmed that Stewart told her she probably would have passed her certification examination if she had spent more time studying "and less time on all this 'union shit.'" Coker denied that she was offered an extension of time to fulfill the requirements of the promotion agreement.

According to Stewart, Kirby protested that the hospital was taking this action against Provance and Coker because of their union activities. The hospital officials denied it. Stewart asserted that he persuaded Vaughn to give both employees an extension of time. According to the department manager, he and Vaughn then had a separate meeting in another office with chief steward Wieger, at which he instructed Wieger to go back and offer Provance and Coker a 30-day extension in which to fulfill the promotion agreement requirements. Stewart contended that Wieger "then proceeded to go into the room. They closed the door. I don't know what was said. She [Wieger] came back out. And she said, 'No,' that they were not going to take the extension." According to Stewart, he and Vaughn then returned to the principal meeting room, where Vaughn "looked at Ken" and said that he did not understand "why you don't want to do this." Provance replied that he was rejecting the extension on the advice of business agent Kirby, and could not complete the requirements within 30 days. Stewart denied that Provance said anything about the extension not having been offered to Coker. Stewart asserted that he told Provance he could "live with the extra few weeks it's going to take to get your results back." Provance, however, denied that Stewart gave him any more time beyond the 30 days.

Vaughn's testimony is similar to Stewart's. The latter persuaded him to make an offer of a 30-day extension to Provance and Coker, and Wieger was then called into the separate meeting. The offer was made twice to the employees, first by Wieger. She returned to the special meeting room to inform the hospital authorities that the offer had been rejected. Stewart and Vaughn then went to the general meeting room where the personnel director expressed his surprise at the rejection. At this time Provance spoke up. Vaughn contended that Provance and Coker were sitting side by side, but agreed that he did not name Coker specifically when making the offer.

Chief steward Wieger gave a version different from that of the hospital authorities. She arrived 30 minutes after the general meeting had begun because of hospital policy which denied her attendance at such meetings except during her lunch hour. She was informed of the classification grievance, the settlement, and the fact that neither Provance nor Coker had yet passed their certification examinations. The steward told Vaughn that she saw no problem—"They're grade four. Is that not right?" "Well," the personnel director replied, "we have no openings in grade four, so these people are going to be laid off." "I can't understand that," Weiger responded. She continued, "It's 11:30 now, and they were working up until eleven o'clock in the hospital. They were functioning. And now, at 11:30, there's no room for them and they can't function." "We don't need grade four's," Vaughn answered, "and there's no room for grade four's."

Continuing with Wieger's account, Stewart and Vaughn then left the office, and a few minutes later called her into another office. They offered her "a deal, a 30-day extension." Wieger replied that this would not do any good because Coker's test results were not back yet, and Provance was not scheduled to take his examination until the end of March. Provance's status constituted her principal objection. "Do you realize what you're doing to these employees?" Wieger asked Stewart and Vaughn. She continued, "They're both good employees. Barbara's a good employee. I realize she's been a thorn in your side at times, but she's a good employee. And Ken's an excellent employee."

According to Wieger, Stewart replied: "I know, but how can I do it to Barbara without doing it to Ken?" Stewart denied at the hearing that he was "that stupid" to make such a statement.

[3] The collective-bargaining agreement provided that in the event of a reduction in force seniority should have "some weight," but could not be applied strictly if it would "adversely affect operations." It further provided, "In the event of layoff, the first consideration will be to maintain the working force at its most efficient level. *If skill and ability are relatively equal, seniority within the classification will govern* [emphasis added]." (G.C. Exh. 14, art. 20.)

On cross-examination, Wieger specifically denied that she made an initial transmission of the offer to the employees. Instead, she went back to the principal meeting room followed by the hospital officials. Stewart was the last one into the office, and he then changed his offer by making it only to Provance. Stewart "stood directly in front of Ken Provance," according to Wieger, "and he looked right at Ken and said, 'Ken, I'm offering a 30-day extension.'" Provance replied, "I won't go for that. We're in this together. If one goes, we both go. It's not fair to do one one way and one the other."

Wieger denied hearing Stewart tell Provance he was willing to wait until the latter's test results were back. She affirmed that Provance said to Stewart: "Now, Mike, you know darn right well it's my union involvement and my activities with the union. If I wasn't so active in the union, this all wouldn't be happening." Stewart replied, according to Wieger, "You're probably right." Wieger's testimony on this issue was corroborated by Coker.

(2) The grievance, the charge, and the newspaper article

Two days later, on March 3, the Union filed the unfair labor practice charge and a grievance (G.C. Exh. 1(c); C.P. Exh. 2).[4] On the same date a local newspaper printed a story quoting Provance and Kirby to the effect that the employees had been laid off because of their union activities and because of the prior newspaper story about the trash compactor. Hospital Vice President Lillard was quoted in a separate article denying the allegations, and chief steward Wieger in still another article disagreeing with Lillard (C.P. Exhs. 4(a), (b), and (c)).

On March 8 Stewart submitted a response to the grievance, asserting that the employees did not fulfill the requirements of their promotion agreements, that a 30-day extension had been offered and refused by the Union, that the hospital did not need any "O.J.T.'s" (Grade 4's) at the moment, and that the grievants could return to work when an opening existed or when they were "qualified under existing standards" (C.P. Exh. 2(a)).

Provance, Wieger, and another union official attended a grievance session with Stewart on the same date, March 8. The chief steward agreed on cross-examination that there was no objection by the Union at this meeting that the 30-day extension offer had been made only to Provance. The latter agreed on cross-examination that Respondent's answer contended that *both* he and Coker had been offered a 30-day extension. He did not question that answer because there was "nothing to question"—he knew what had transpired. Respondent's actual statement of position, entitled "Provance/Coker grievance," reads in paragraph 4 as follows: "A 30-day extension of the agreement was offered, but refused by the Union" (C.P. Exh. 2(a)).

On March 19, Vaughn submitted the hospital's additional position on the grievance—it had not changed (C.P. Exh. 6).

[4] Processing of the grievance has been suspended pending disposition of the unfair labor practice charge.

(3) The offer to Coker and the Union's response

On March 22, Vaughn wrote Coker a letter stating that the hospital remained "somewhat surprised that you declined our prior offer of an extension of our agreement whereby you would have continued to work full time in Grade 7." The letter contained an offer of an occasional job at Grade 4 (G.C. Exh. 16). Coker turned the letter over to business agent Kirby, who replied by letter on March 29 as follows:

> The letter you sent to Mrs. Coker offering her occasional work as a respiratory therapist is a joke. You know as well as I that if she is capable of occasional work, she is also capable of a full time position. You also stated that you offered her a thirty day extension. This is not correct. The extension was offered to Ken Provance not Mrs. Coker and Mr. Provance was unable to accept this as he will not take his test for approximately thirty days.
>
> Larry, I feel it is time that you got your facts straight, as befits a man in your position, and reinstate these two people to their regular jobs. These childish games are un unnessarily bad reflection on Oak Ridge Hospital [G.C. Exh. 17].

Provance also received an offer of an occasional job, which was declined by Kirby.

A few days later, on April 1, Kirby wrote Vaughn that the Union had "shown beyond a shadow of a doubt" that the hospital's actions were "unjust and . . . without any foundation in fact" (C.P. Exh. 7).

b. *Factual analysis*

Respondent's position that Wieger transmitted a 30-day offer of an extension of the agreement to both Provance and Coker is not supported by any credible evidence. It is improbable that she would have marched back to the general meeting at the hospital's request to submit an offer which she personnally opposed. Provance's and Wieger's testimonies do not contain any account of a separate offer transmitted by her, and Stewart frankly admitted that he did not know what Wieger said during her alleged separate visit with the employees. I find that no such separate visit or offer ever took place.

I also credit Wieger's testimony that the offer as originally contemplated in her separate meeting with the hospital authorities was intended for both employees. When Wieger protested the arrangement, acknowledging that Coker had been a "thorn" in the hospital's side, Stewart noted that he could not "do it to Barbara without doing it to Ken." Although Stewart denied saying this, I credit Wieger because the response she attributed to Stewart was a natural one in light of her characterization of Coker, because of the precise detail which she provided concerning this separate conversation, and because she appeared to be a more truthful witness than Stewart.

The testimonies of Wieger, Provance, and Coker also establish that Stewart did change the offer when the conferees returned to the general meeting, and made it only to Provance. Clues to the veracity of the General Counsel's witnesses may be found in the statements of the hos-

pital authorities. Thus, Stewart, who claimed that it was Vaughn who made the offer, admitted that the latter looked at Ken when he did so, while Vaughn stated that it was Provance who "spoke up." Respondent's position—that Provance and Coker rejected the offer on the advice of business agent Kirby, without giving any reason—is improbable. The Union's position—that the hospital made the offer only to Provance—was not contradicted in susbequent proceedings. Although the subject was not raised in the March 8 grievance session, the hospital's statement of position was ambiguous in that it did not specifically allege that both Provance and Coker had received an offer of a 30-day extension. When the hospital did make this specific allegation in its letter to Coker, the Union promptly denied it. I therefore find that the hospital on March 1 made an offer only to Provance of a 30-day extension of his agreement, and that he rejected it because it had not been offered to Coker, and because it would not have been beneficial to him in light of his scheduled examination of March 29. Contrary to Stewart and crediting Wieger and Provance, I also conclude that the hospital did not offer the latter a further period beyond the 30 days for receipt of test results.

Summarizing the credible evidence, at a meeting on March 1 Respondent demoted Provance and Coker to Grade 4 because they had not met the requirements of their promotion agreements, and simultaneously laid them off allegedly because there was no "vancancy" for a Grade 4, in the language of the layoff notices, or because of "lack of work," according to verbal statements made to them. An offer of a 30-day extension of the promotion agreement was made to Provance and was rejected because it would have been ineffectual and because it was not made to Coker. Department Manager Stewart told Coker—who had failed a prior examination—that she probably would have passed if she had spent more time studying and less time on "all this union shit." He also agreed with Provance that the latter's layoff probably would not have taken place absent his official union position and activities.

9. Dora Bice's conversation with Stewart

Dora Bice was promoted from Grade 4 to Grade 7 in late 1981. In 1982 she was demoted to Grade 4, and had a conversation with Stewart about the matter. According to Bice, Stewart told her that Coker was a troublemaker, that he got rid of the troublemaker, and that Bice and Provance "got caught in the crunch."

Stewart acknowledged having a conversation with Bice about her demotion. He said that she had "got caught up in this new policy" the hospital had instituted requiring board certification. Stewart asserted that he told Bice he would not change her pay despite the demotion.[5]

Stewart did not deny telling Bice that Coker was a troublemaker. He did agree that Bice had been caught up in something, which he attempted to explain as the hospital's new policy. His more probable meaning is that Bice and Provance had been caught in the crunch of getting rid of Coker, the troublemaker, i.e., that the hospital could not consistently demote coker for not meeting the educational requirements without demoting others who failed to do so. I credit Bice's testimony.

10. The rehiring of Provance and Coker

a. *The "occasional" job offers*

As described above, Provance and Coker received and declined offers of occasional jobs about 3 weeks after having been laid off. The collective-bargaining agreement defines an occasional worker as one who is employed on a day-to-day basis with no benefits (G.C. Exh. 14, art. 30). Coker testified that an occasional employee could not belong to the Union or hold union office. This appears to be borne out by the recognitional clause of the contract, which describes the unit as one composed of "full-time nonprofessional employees" and "part-time nonprofessional employees regularly scheduled for at least 24 hours per week" (G.C. Exh. 14, art. 1).

b. *The regular Grade 4 position and Provance's promotion to Grade 7*

(1) Summary of the evidence

On March 19, according to Personnel Director Vaughn, he attended a third-step grievance meeting with Provance, Coker, chief steward Wieger, business agent Kirby, and another union official. According to Vaughn, Kirby asked that Provance and Coker be allowed to continue working until they had passed their examinations. Vaughn rejected this proposal. Ten days later, on March 29, he posted openings for two Grade 4 jobs in the Respiratory Therapy Department (C.P. Exh. 8).[6] On April 2, chief steward Wieger wrote Vaughn asking him to consider reinstatement of Provance and Coker (C.P. Exh. 9). In early April, the hospital notified Provance and Coker that one regular Grade 4 position was available on the night shift. Both expressed interest, but the hospital selected only Provance for employment, despite its recent posting of two Grade 4 openings.

Provance had been laid off about 5 weeks and began working again as a Grade 4 employee on April 5, according to Assistant Department Manager Cox, testifying with the aid of hospital records. One night, as Provance was scheduled to work with another employee, the latter called in sick, and other employees on the second shift told Provance that he would be working alone that night. Provance replied that he could not do this, since he was only a Grade 4, and therapists at this level were not permitted to work alone in the intensive care unit under the hospital's new policy. Provance testified that

[5] The disparate nature of Respondent's treatment of Bice is considered infra.

[6] Receipt of C.P. Exh. 8 was opposed by Respondent on the ground that it was a copy, and did not match any of Respondent's exhibits. Personnel Director Vaughn testified that he had examined the hospital's files, and could not find anything resembling this exhibit. However, chief steward Wieger testified that the document was a copy of another one "on the board" which itself was a copy, since the originals of job openings are filed by the hospital and are not seen by employees. Wieger testified that she asked a hospital secretary to take the document down from the board and to provide her with a copy. At that point Respondent's counsel stated that he had no further objections to receipt of the document.

he called Stewart and said, "Michael, I can't work by myself. I'm just a grade four." The department manager replied, "Well, I'm going to promote you to a grade 7." Provance testified that his raise was jokingly referred to in the hospital as a "field promotion" because there was no one else to work in the intensive care unit at the time. According to Provance, he had not yet received the results from the written part of his certification examination, and had not yet taken the clinical part of the test.

Stewart, on the contrary, testified on direct examination that Provance told him that he had passed the test. The department manager wrote a memo to Provance's supervisor, dated April 15, reclassifying Provance as a Grade 7 effective April 14, and suggesting that he "bring a copy of his completed test scores" (R. Exh. 59). On cross-examination, Stewart admitted that Provance took the test on March 29, and that the results would not be known for 6 to 8 weeks. Nonetheless, Stewart contended, his promotion of Provance on April 14—2 weeks after the test—was based on Provance's oral assurance to Stewart that he had passed the test. This was done without documentation despite Stewart's statement that the absence of same might result in a lawsuit. As for the clinical practice test, Stewart testified that he simply waived that requirement because he knew that Provance could do the clinical work. He acknowledged that Provance's diploma was dated July 9.

(2) Factual analysis

Stewart's testimony is obviously false, since the period from March 29 to April 14 does not encompass 6 to 8 weeks, the time required to get the test results. His assertion that Provance told him that he had passed the test about 2 weeks after taking it is unbelievable in light of the well-known time frames. I credit Provance's version of these events.

c. *The rehiring of Coker*

Coker passed the written part of her examination in August, but had not yet taken the clinical examination. In that month the hospital offered her a part-time position at Grade 7. Coker called Vaughn and declined on the ground that she did not meet the requirements for a Grade 7. On September 7, Coker wrote Vaughn in further explantion as follows:

> I declined your offer to re-call to a position of Grade 7 in Respiratory Therapy of which according to the Hospital Contract . . . I do not qualify. The job in which you offered me was not only out of my classification since I was demoted on March 1, 1982, to Grade 4, but was also not of equal status to my full-time position but was that of a part-time employee. I fully expect to remain on your re-call list for re-employment as a Grade 4 Respiratory Therapy Tech. since I am forced to remain in a layed-off [sic] status [G.C. Exh. 18].

Thereafter, the hospital offered Coker an occasional job on weekends, which she accepted and was occupying at the time of the hearing.

11. Respondent's "lack of work" defense

Respondent's position, as set forth by Vaughn on March 1 during the layoff meetings, was that the hospital had no openings for Grade 4 personnel, although it did need the "more qualified" higher grades. On March 1, the same date as the layoffs, the hospital posted job openings for two Grade 7 or 9 therapists as replacements for Provance and Coker (R. Exh. 48).

However, Provance testified that there was an excess of work for Grade 4 respiratory therapists after the layoffs, and that they were required to work overtime for several weeks. Bice, who had been demoted to Grade 4, testified that she worked overtime for about 2 weeks after the layoffs, picking up about 1 extra day per pay period. Chief steward Wieger affirmed that the hospital instituted 12-hour shifts after the layoffs, but stated that one of the Grade 4 employees objected to this and filed a grievance. Accordingly, the 12-hour shifts were discontinued by Assistant Department Manager Debra Cox.

This testimony is corroborated by Respondent's timecards which, according to Cox's testimony, show overtime worked by the regular Grade 4 respiratory therapists for the pay period ending March 14 immediately following the layoffs.[7] This is in contrast to the minimal overtime during the preceding pay period ending February 28.[8] Overtime declined in the two pay periods following March 14.[9] However, as affirmed by Wieger, this was not the result of any dimunition in Grade 4 work, but, rather, was caused by a grievance against overtime. The continuing need for such work is shown by the fact that Respondent posted openings for two Grade 4 positions on March 29, less than 1 month after it laid off Provance and Coker. I therefore reject the hospital's reason that such layoffs were caused by lack of Grade 4 work.

12. The argument that the hospital was taking necessary action required by the contract and the promotion agreements

The hospital authorities argued that they were merely abiding by the terms of the contract and the promotion agreements in laying off Provance and Coker. There is no merit to this argument. The contract provides that employees be classified in accordance with the skills which they use (G.C. Exh. 14, art. 31); Provance and Coker *were* utilizing the skills applicable for their provisional Grade 7 level since they were functioning in the intensive care unit at the time of the layoffs. Indeed, they had been working in that unit as Grade 4's both before and after the hospital took over the Respiratory Therapy Department from the private contractor.

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[7] The records, according to Cox, show the following hours of overtime for the indicated employees: Rhonda Justice, 3.5; Dora Bice, 11.8; Vicki McCoy, 4.7; and Julia Watson, 5.5. Trina Robinson, an occasional employee, did not work any overtime.

[8] For the period ending February 28, Rhonda Justice worked .9 hours overtime and Watson 1.9 hours, while neither Bice nor McCoy had any overtime.

[9] For the period ending March 28, Bice's overtime dropped slightly to 11 hours while none of the other Grade 4 employees had any. The only overtime worked the succeeding pay period, ending April 11, was .9 hours by Bice.

The provisional promotion agreements, with their educational requirements, were the result of the classification grievance arising pursuant to the contract, but were not required by the contract provisions themselves. The educational requirements were not mandated by any Federal or state rule. Stewart testified that the "Joint Commission," which he identified as a body regulating hospital practice and accrediting hospitals, merely required that individuals working in special care units have adequate training in anatomy and physiology, but did not specify certification below the level of department director. The hospital was inspected before and after Stewart became the department manager, and never lost its accreditation.

Respondent argues in its brief that Provance and Coker "as a matter of law . . . are estopped from attempting to impugn their written obligations by vague testimony of verbal assurances [against loss of their jobs]," citing authority on the reformation of instruments. The merit of this argument is suspect because the testimony was not vague, and the credited evidence establishes that Provance and Coker, after their refusal to sign the agreements, were assured that doing so would not endanger their jobs.

As described above, the promotion agreements which the hospital presented to Provance and Coker did not conform to the hospital's agreement with the Union. Although the Union's acting president signed both sets of documents, the inconsistency clouds Respondent's argument that it was merely applying the terms of the promotion agreements when it laid off Provance and Coker.

Finally, the hospital did not abide by the terms of its own agreements. Thus, Vaughn's telling Provance during the layoff interview that the latter had no bumping rights against other Grade 4's with less seniority was contrary to the provisions of the contract, since it was not shown that the other Grade 4's had more skill and ability than Provance.[10] Conversely, after Provance was brought back, the hospital's promotion of him to Grade 7 before he had completed the certification requirement shows that the hospital did not consider itself bound by the terms of the promotion agreement. I reject as sophistry the hospital's arguments that the layoffs were made pursuant to the collective-bargaining agreement or the promotion agreements.

13. Evidence of disparate treatment

a. *Craig Brent*

Craig Brent was one of the Grade 4 employees who was provisionally promoted to Grade 7. The promotion agreement required him to complete a college course in respiratory therapy, at which time he would be promoted to Grade 9, rather than the Grade 7 which was given to Provance and Coker. Failure to continue in school would result in reclassification to Grade 4, "assuming a vacant position exists." However, unlike the Provance and Coker promotion agareements, the Brent agreement did not require him to pass an NBRT examination in order to avoid demotion (R. Exh. 47). When Provance was laid off, Brent, like Coker, had not yet completed his training. He changed shifts and replaced Provance. The record discloses no valid reason why Brent's agreement and treatment should have been different from that of Provance and Coker.

b. *John Mitchell*

The General Counsel and the Union presented evidence to establish disparate treatment of John Mitchell. The first issue is Mitchell's grade at the time of the filing of the classification grievance. Provance testified that Mitchell was a part-time employee who was prompted to Grade 7 because he signed a provisional promotion agreement, thus implying that he had been a Grade 4 employee. Mitchell attempted to take the NBRT examination, but was rejected. Personnel Director Vaughn disputed Mitchell's grade, and contended that he was already a Grade 7 at the time of the grievance. Department Manager Stewart, however, was asked why he classified Mitchell as a Grade 7. Stewart answered that the hospital was trying to solve two problems—it wanted to address the grievance, and at the same time felt the necessity of staffing the intensive care unit. Stewart described some emergencies that had occurred in the unit during his first week as department manager. Since Mitchell had had experience in cardio-pulmonary technology with the Veterans Administration, he was made a Grade 7. Stewart's testimony suggests that the promotion came about the same time as the filing of the classification grievance.

The grievance, dated July 20, 1981, is signed by Mitchell. It recites that the signatories are all "OJT's" or "noncredentialed employees," and that such employees "have been placed in the number (4) grade." Vaughn disputed this document and pointed to a question mark opposite Mitchell's signature which, he asserted, he placed there (G.C. Exh. 8). It is incredible that Mitchell did not know his own grade and pay at the time he signed the classification grievance. I find that he was a Grade 4 at that time, and was promoted to Grade 7 shortly thereafter.

The next issue is whether Mitchell signed a provisional promotion agreement. None is in evidence. As already noted, Provance testified that Mitchell did sign such an agreement. Provance further affirmed that he saw the agreement, and that it required Mitchell to take the first certification examination which became available. Stewart flatly denied that Mitchell signed any agreement.

Bice, however, testified that Mitchell applied to take the NBRT test and was rejected. The hospital appealed, and Mitchell was again turned down by the NBRT. Stewart then had a conversation with Bice about August 1982 and showed her "a piece of paper that he had written . . . for John [Mitchell] that he did not have to sit for those boards." Bice affirmed that she said to Stewart, "Well, you told me that Johnson would be demoted just like the rest of us." The department manager answered, "Well, I may have said it. I said a lot of things back then. I just don't remember." Stewart did not deny this testimony, and I credit it. It suggests that Mitchell had been promoted, and corroborates Provance.

[10] Supra, fn. 3.

Bice's testimony also shows that Stewart prepared some kind of paper concerning Mitchell. Since the department manager's position was that only credentialed employees be classified at Grade 7, it is unlikely that the hospital would have permitted Mitchell to work in the intensive care unit without at least trying to get him to comply with the same standards that the other Grade 7 employees had to meet. Although Mitchell may have had extensive cardio-pulmonary experience with the Vetrans Administration, Stewart's testimony shows that he considered this only as a reason for putting Mitchell into the intensive care unit in an emergency. These considerations tend to buttress Provance's forthright testimony that Mitchell signed an agreement requiring him to pass an NBRT examination. The NBRT, however, found him ineligible to take the examination. The hospital then simply eliminated the requirement that Mitchell do so, and continued him as a Grade 7 employee. The record does not disclose any valid reason for this different treatment of Mitchell.

c. *Dora Bice*

Bice received even more favored treatment. She came to the hospital from the same private respiratory therapy contractor where Provance and Coker had worked. She had completed an AMA course and had taken and failed the NBRT examination. Stewart instituted a policy in September allowing her to take it again. Thereafter, Bice was promoted to Grade 7. "I was not aware of anything," she testified, "I just automatically was a grade 7." Stewart agreed that Bice never signed an agreement. Asked to explain the reason, he replied, "Because this screwy job classifications don't fit these people. See, Respiratory Therapy really got messed over."

Bice took the examination again in December 1981, failed it again, and was demoted to Grade 4 because, as related above, she got "caught in the crunch" of demoting Provance and Coker. Stewart testified that the hospital had approved three Grade 4 positions in response to the classification grievance. There were three Grade 4's already filling these positions, and there was, therefore, no room for Bice at the time of her demotion. However, she was not laid off. Stewart solved the problem by creating an extra "slot" for Bice as a Grade 4. As shown above, he told her that she would not suffer any reduction in pay. This is in stark contrast to the treatment given Provance and Coker.

The hospital again changed policy and offered Bice another promotion to Grade 7 about August 1982 on condition that she pass an NBRT examination. She declined because of the possibility that she could be terminated if she failed the examination.

D. *Legal Analysis*

1. Dixie R. Hicks

The General Counsel submits characterizations of the discipline administered to Hicks. Thus, he argues that the hospital had been "very lenient" about her tardiness until her participation in the contract negotiations and the filing of grievances over "harassment." However, while the discipline administered to Hicks was obviously more severe in the middle of 1982, and ultimately led to discharge, a pattern of increasing severity had begun to emerge before Hicks' participation in the contract negotiations in June 1981. Thus, prior infractions led to a warning in October 1980 that future tardiness would result in a written reprimand, and this was followed by further discussions of the same subject in January and April 1981. It is therefore not entirely accurate to state, as does the General Counsel, that Hicks had not received a serious reprimand until recently. It is obvious that the reprimands did not improve her work attendance or punctuality. Although the General Counsel argues that Hicks' participation in the contract negotiations caused her increasingly servere discipline, an alternative explanation may be found in the fact that Hicks' tardiness persisted despite the discipline. In these circumstances, it would not have been unreasonable for the hospital to consider increased severity of punishment in order to effect a change in behavior. This alternate explanation is not grounded on union animus.

The General Counsel further argues that the reprimands based on patient care demonstrate that the hospital was "out to get Hicks as every determination was made against her without consideration of the possibility of finding in her favor." Thus, with respect to the paralyzed patient and the orange slices, the General Counsel points out that it was Nursing Director Vicki Moore who actually fed the slices to the patient, and argues that "any indiscretion in such action" is attributable to Moore rather than to Hicks. This argument misstates the facts. Hicks was not disciplined for feeding orange slices to the patient—she was reprimanded for *not* doing so, and for administering medication to a partially paralyzed patient in an unsafe position. Moore simply took over the duties which Hicks had failed to perform.

With respect to Henderson's medication card, the General Counsel argues that "the responsibility to change the medical order was definitely not Hick's. Medication orders are the province of a registered nurse, not a LPN as Hicks is." However, as set forth above, I have concluded that it was the responsibility of the nurse who made up the new medication card to destroy the old one—and it was Hicks who made up the new card because Mary Oaks (the registered nurse) was busy. Hicks' testimony that she "had no idea what happened to the old card" is not believable taking into consideration the fact that she was in the same room with Oaks administering medication to a patient pursuant to a written order. Oaks, of course, was also partially responsible since she "did not think about destroying the old card." The record does not reveal whether Oaks was reprimanded, nor does it indicate whether anything was said to still another nurse who, the next day, gave the discontinued medication to the patient based on the old card. It was Hicks who initiated this chain of events by making up the new card without following through and destroying the old one. The reprimand cannot fairly be characterized as arbitrary.

The General Counsel next argues that Hicks was reprimanded for "taking an unauthorized break where in reality she was awaiting a phone call from the laboratory

concerning a patient scheduled for immediate surgery." This argument also concerns Henderson and again misstates the facts. Hicks was not reprimanded for taking an unauthorized break. An early break had in fact been authorized for her—but only if she had taken care of her duties which included assisting Henderson in eating. As set forth above, the evidence is inconclusive on whether Hicks was really waiting in the nurses lounge for a telephone call about a patient scheduled for surgery. (How was this possible if there was no phone in the lounge, as Brewer asserted.) In any event, it is clear that Hicks left Henderson unattended during breakfast, and did not arrange for a substitute to assist him in eating.

Finally, the General Counsel argues that the hospital arbitrarily discounted a doctor's excuse provided by Hicks without bothering to check with the doctor, who would be readily available. This is not true. As more fully described above, this incident concerned a doctor's excuse dated August 8 concerning Hicks' alleged illness about 2 weeks before that date. Supervising Nurse Brewer asserted and Hicks denied that the doctor authenticated the excuse. This factual dispute is grounded in hearsay, of course, but it cannot fairly be said on this evidence that the hospital failed to check with the doctor. On Brewer's account she did so. I infer that these preprinted forms are readily available to hospital personnel. Such availability, plus the fact that the excuse was dated about 2 weeks after the alleged illness, are factors which the hospital could reasonably have considered in assessing the reliability of the excuse. Hicks' discipline on this occasion—a 3-day suspension—was also based on the fact that she had failed to call in and report that she would be asbent from work and, obviously, on her long record of tardiness.

The General Counsel is therefore incorrect in his argument that Respondent's discipline of Hicks establishes animus toward her based on her union activity. There is nothing else in the record to establish such animus. Although Hicks had been a member of the Union's negotiating team, and had been quite vocal in her arguments for a pay increase and other benefits, this activity had taken place in June 1981, and there was no such activity by Hicks subsequent to the execution of the collective-bargaining agreement on July 20. Although she subsequently filed grievances, they were all made on her own behalf rather than that of other employees. The absence of any activity by Hicks in a representative capacity from about June 1981 until her discharge in December tends to indicate that the latter was not discriminatorily motivated. *Cherokee Culvert Co.*, 266 NLRB 290 (1983). She was repeatedly reprimanded, was warned, and was twice suspended for a long history of tardiness. Under almost identical circumstances, the Board has concluded that the employer's reason for discharging the employee was lawful. *A&T Mfg. Co.*, 265 NLRB 1560 (1982).

Another issue was Hicks' treatment of two patients, a factor which has also been considered by the Board as evidence of lawful motive in discharging an employee. *Liberty Pavilion Nursing Home*, 254 NLRB 1299 (1981). Although the patient care incidents in themselves may not have been sufficient to warrant discharge, the evidence shows that the hospital viewed them as a continuation of unacceptable conduct. Finally, when the last reprimand was greeted by Hicks with an expletive, the hospital concluded that she had an unacceptable attitude toward her employer and her work, and discharged her. The Board has concluded in like circumstances that an employee's bad work record and poor attitude established the lawfulness of the discharge. *Cadiz Convalescent Center*, 258 NLRB 559 (1981).

I therefore conclude that the General Counsel has not established a prima facie case that Hicks' discharge was discriminatorily motivated. For similar reasons, I reach the same conclusion in connection with the complaint allegation concerning the 10-day suspension on October 28. Accordingly, I will recommend that these allegations be dismissed.

2. Ken Provance and Barbara Coker

The case is otherwise with respect to Provance and Coker. Unlike Hicks, they were union stewards engaged in continuous activity on behalf of fellow employees. There is abundant evidence of the hospital's dislike of their filing of grievances, in comparison with former inactivity in such matters. Both Provance and coker received reprimands for abuse of sick leave under circumstances which raise serious doubts about the fairness of such discipline. The newspaper story about Provance's grievance concerning the trash compactor made the hospital's vice president "madder than hell." Department Manager Stewart or Assistant Department Manager Cox told Supervisor Harris that Provance and Coker were causing problems, and that the hospital had to get rid of them. In a discussion which Stewart had with Coker about previous charges which the latter had filed, Stewart prophetically remarked that she would be back (with more charges) as the result of a "surprise."

On February 26, just before the layoffs, Department Manager Stewart candidly admitted to Provance that the action probably would not be taken it it were not for Provance's status as a union steward. The linkage between the layoffs and Provance's union activities was again expressed by Stewart on March 1. The hospital's animosity toward the grievance machinery in the collective-bargaining agreement is further displayed in Stewart's warning to both Provance and Coker that he would compel them to live up to the terms of the promotion agreement if they required him to abide by the terms of the contract. On March 1, the day of the layoffs, Personnel Director Vaughn told Coker, who had failed an examination, that she probably would have passed if she had spent less time on "all this union shit." Stewart asked union steward Wieger, "How can I do it to Barbara without doing it to Ken?" He told Bice, who had also been demoted, that Coker was a troublemaker, and that Bice and Provance were caught in the crunch. These statements clearly show that Respondent was seeking to justify the discharge of Coker, a "thorn" in the hospital's side according to Wieger, with discipline of other employees in similar circumstances, although in Provance's case there was also animus concerning his union activities.

The hospital's treatment of the promotion agreements further demonstrates its unlawful motivation. Provance and Coker *were* assured by the hospital that their signatures on the agreements would not affect their jobs. Nonetheless, this is precisely what happened. The hospital's offer of a 30-day extension of the agreements was a sham, since it would not have resulted in any benefit to Provance, while Coker was excluded. The various reasons advanced by the hospital for the layoffs were pretextual as explicated above. The disparate treatment of other employees constitutes evidence of unlawful motive under established Board law.

I therefore find that the General Counsel has established a strong prima facie case that the layoffs of Provance and Coker were motivated by their union activities, and that Respondent has not rebutted that case by proving that they would have been laid off even if they had not engaged in such activities. Accordingly, I conclude that the layoffs were discriminatorily motivated and violative of Section 8(a)(3) and (1) of the Act. *Wright Line*, 251 NLRB 1083 (1980).

In accordance with my findings above, I make the following

CONCLUSIONS OF LAW

1. Oak Ridge Hospital of the United Methodist Church is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. Service Employees International Union, Local 150-T, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.
3. By laying off employees Ken Provance and Barbara Coker on March 1, 1982, because of their union activities, Respondent thereby violated Section 8(a)(3) and (1) of the Act.
4. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
5. Respondent has not violated the Act except as specified herein.

THE REMEDY

It having been found that Respondent has engaged in certain unfair labor practices, it is recommended that it be ordered to cease and desist therefrom and to take certain affirmative actions designed to effectuate the policies of the Act.

It having been found that Respondent unlawfully laid off Ken Provance and Barbara Coker on March 1, 1982, from full-time Grade 7 positions, and that it recalled Provance to a Grade 4 position and thereafter promoted him to a Grade 7 position, it is recommended that Respondent be ordered to offer Barbara Coker immediate and full reinstatement to her former position or, if such position no longer exists, to a substantially equivalent position, without any loss of her seniority or other rights and privileges, discharging if necessary any employee hired to fill said position. Although Respondent offered Coker a job at Grade 7, it was only part-time in nature, and, therefore, did not constitute an offer of substantially equivalent employment.

It is also recommended that Respondent be ordered to give Provance written assurances that his layoff shall not have subjected him to any loss of seniority or other rights and privileges, and to make him and Coker whole for any loss of earnings he or she may have suffered by reason of Respondent's unlawful conduct, by paying each of them a sum of money equal to the amount he or she would have earned from the date of his or her unlawful layoff to, in the case of Provance, the date of his promotion to Grade 7, and, in the case of Coker, the date of an offer of reinstatement, less net earnings during such periods, with interest thereon to be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corp.*, 231 NLRB 651 (1977).[11]

Inasmuch as Respondent has demonstrated a proclivity to utilize the terms of the promotion agreements as a pretext for discrimination against its employees, and since said terms are inconsistent with the terms of Respondent's agreement with the Union concerning said matters, it is further recommended that Respondent, with agreement of the other parties, be ordered to conform said promotion agreements to its agreement with the Union, by deleting the requirement of passage of an NBRT examination as a condition for continued classification at the Grade 7 level.

I shall also recommend that Respondent be required to post appropriate notices, to expunge from its personnel records all references to its unlawful conduct toward Provance and Coker, and to notify each of them that this action has been taken and that evidence of their unlawful layoffs will not be used as a basis for future personnel action against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[12]

ORDER

The Respondent, Oak Ridge Hospital of the United Methodist Church, Oak Ridge, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discouraging membership in Service Employees International Union, Local 150-T, AFL-CIO, or any other labor organization, by laying off employees because of their union activities, or by discriminating against them in any other manner with respect to their hire, tenure of employment, or terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the purposes of the Act.

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[11] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[12] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Offer Barbara Coker reinstatement to her former position as a full-time employee in its Respiratory Therapy Department at the Grade 7 level or, if such position no longer exists, to a substantially equivalent position, without prejudice to her seniority or other rights and privileges, discharging if necessary any employee hired to replace her, and make her and Ken Provance whole for any loss of earnings either of them may have suffered by reason of Respondent's unlawful layoffs of them on March 1, 1982, in the manner described in the section of this decision entitled "The Remedy." Respondent shall also give Ken Provance written assurances that his layoff shall not cause him any loss of seniority or other rights and privileges.

(b) With the agreement of the other parties, conform its promotion agreements with Provance and Coker to its agreement with the Union covering the same subject, by deleting the requirement in said promotion agreements that the employees' continued employment at the Grade 7 level is conditioned on their successfully passing a certification examination conducted by the National Board of Respiratory Therapy.

(c) Expunge from its personnel records, or other files, any reference to its discrimination against the employees described above, and notify each such employee in writing that this action has been taken and that evidence of his or her unlawful layoff will not be used as a basis for future personnel actions against him or her.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its hospital in Oak Ridge, Tennessee, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 10, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found herein.

[13] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."